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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 ATECH FLASH TECHNOLOGY INC. &
13 SUNUS SUNTEK INC.

14 Plaintiffs,

15 vs.

16 MARTIN C. LIN, YUSHAN WANG,
17 A.K.A. SAMANTHA WANG, and IMAGE
DEVICE INC.

18 Defendants.
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No. C07 02949 PVT

**DEFENDANTS' REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS**

The Hon. Patricia V. Trumbull

Date: Tuesday, September 4, 2007

Time: 10:00 a.m.

Courtroom: 5, 4th Floor

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1 Plaintiffs seek to maintain the vague claims that nevertheless compel Defendants to
 2 restrict legitimate sales to buyers that Plaintiffs *might* later claim as part of an unspecified
 3 “customer list.” Defendants ask this Court to grant their motion, ending Plaintiffs’ bad faith
 4 misuse of the judicial process.

5
 6 In their response, Plaintiffs admit failure to plead diverse citizenship, warranting
 7 dismissal. They identify only two of numerous defects to cure by amendment and then argue
 8 facts and offer evidence contradicting necessary jurisdictional allegations and tending to
 9 undermine diversity. The Complaint must be dismissed without leave to amend.

10
 11 Plaintiffs also decline to address the authorities compelling dismissal with prejudice of
 12 Counts I through V and fail to proffer curative facts, making amendment futile.

13 **REPLY STATEMENT OF ISSUES AND FACTS**

14 Defendants rely on the Statement of Issues to Be Decided and Statement of Facts
 15 previously presented.¹ They address below an additional issue presented by Plaintiff’s
 16 Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Dismiss
 17 (“Opp’n Mem.”): Whether Plaintiffs should be granted leave to amend their jurisdictional
 18 allegations pursuant to 28 U.S.C. § 1653 and claims pursuant to Fed. R. Civ P. 15(a).
 19

20 **ARGUMENT**

21 **I. PLAINTIFFS HAVE FAILED TO ESTABLISH DIVERSITY JURISDICTION.**

22 A plaintiff always bears the burden of establishing subject matter jurisdiction. *See*
 23 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); 5 C. Wright & A. Miller,
 24

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 26
 27 ¹ Defendants dispute the facts stated in Plaintiff’s opposition memorandum (“Opp’n Mem.”)
 28 and in the Declaration of Larry Liang (“Liang Decl.”). Without waiving the right to contest
 such allegations and facts, Defendants address only those issues presented for disposition to the
 Court in this motion.

1 Federal Practice and Procedure § 1206 (1969 & Supp. 2005) (“the basis upon which
 2 jurisdiction depends must be alleged affirmatively and distinctly and cannot ‘be established
 3 argumentatively or by mere inference.’”). A facial challenge to jurisdiction examines the
 4 allegations in the complaint, while a factual challenge can encompass extrinsic evidence outside
 5 the pleadings. *See Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997). Courts
 6 should not, in an attempt to determine whether subject matter jurisdiction exists, resolve
 7 genuinely disputed facts. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

9
 10 **A. Plaintiffs acknowledged failure to plead complete diversity requires dismissal.**

11 Plaintiffs concede that they have not pled the existence of diversity jurisdiction due to
 12 “errors” made “on information and belief” but make the unsupported statement that they “do
 13 not negate the establishment of subject matter jurisdiction in this case.” Opp’n Mem. at 8.
 14 They claim as their only failings that “Plaintiffs have, on information and belief, erroneously
 15 stated in the complaint that defendant Wang *resided* in San Jose, California . . . , and have
 16 unintentionally omitted to [sic] include defendant Wang in its jurisdiction statement.” Opp’n
 17 Mem. at 8 (citations omitted) (emphasis added).²

18
 19 Insufficient allegations of diversity jurisdiction require dismissal of the Complaint.
 20 *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001) (“A
 21 plaintiff suing in a federal court must show in his *pleading*, affirmatively and distinctly, the
 22 existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on
 23 having the defect called to its attention or on discovering the same, *must dismiss the case*,
 24 unless the defect be corrected by amendment.”) (emphasis added) (citation omitted). *See also*,
 25
 26
 27
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1 *Fifty Associates v. Prudential Ins. Co.*, 446 F.2d 1187, 1190 (9th Cir.1970) (“ [f]ailure to make
 2 proper and complete allegations of diversity jurisdiction relegates a litigant to the jurisdictional
 3 purgatory. . . .”).

4
 5 **B. Amendment to re-plead diversity based on “residency” would be futile.**

6 Plaintiffs do not provide an amended complaint with their papers,³ but seek leave to
 7 amend under Fed. R. Civ. P. 15(a) to correct those jurisdictional pleading errors they have
 8 identified. Opp’n Mem. at 8. Plaintiffs propose to cure the defective allegations by merely
 9 amending to plead that (1) “Defendants Lin and Wang . . . *reside* in Suwanee, Georgia,” and
 10 that “[t]hey *incorporated* defendant Image Device in Georgia.” Opp’n Mem. at 8 (emphasis
 11 added). Plaintiffs conclude that these allegations will establish “[t]herefore, complete diversity
 12 of citizenship between all plaintiffs and defendants exist [sic] in this case.” Opp’n Mem. at 8.

13 The liberal standard of Rule 15(a) is not applicable for jurisdictional pleading defects.
 14 Instead, 28 U.S.C. § 1653 provides this Court discretion to deny or allow amendment upon a
 15 failure properly to plead jurisdiction. 28 U.S.C. § 1653 (“Defective allegations of jurisdiction
 16 may be amended, upon terms, in trial or appellate courts.”) (emphasis added).

17 Dismissal without leave to amend is allowed where the complaint cannot be cured by
 18 amendment, such as when complete diversity has not been established. *Snell v. Cleveland, Inc.*,
 19 316 F.3d 822, 828 n.6 (9th Cir. 2002) (granting leave to amend jurisdictional allegations where
 20 “undisputed that complete diversity of citizenship existed.”) (citation omitted).

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 27 ² In fact, Plaintiffs alleged only the “primary” residences of Defendants Lin and Wang. Comp.
 28 ¶¶ 2-3. This allegation implies that each defendant has more than one residence, further
 undermining establishment of citizenship, discussed *infra*.

³ See Civil Local Rule 10-1.

1 **1. Plaintiffs' amendments would fail to state or establish diversity jurisdiction.**

2 As Defendants noted, 28 U.S.C. § 1332(a)'s plain language makes "citizenship" rather
 3 than "residence" the criteria for diversity jurisdiction. Defs' Mem. at 6 and n. 2. The Supreme
 4 Court has consistently held that state citizenship for purposes of diversity jurisdiction depends
 5 not on residence, but on national citizenship and domicile. *See, e.g., Newman-Green, Inc. v.*
 6 *Alfonzo-Larrain*, 490 U.S. 826, 828 (1989). ("In order to be a citizen of a State within the
 7 meaning of the diversity statute, a natural person must both be a citizen of the United States and
 8 be domiciled within the State."). The existence of such national and state citizenship cannot be
 9 inferred from Plaintiffs' allegations of mere residence, standing alone. *See, e.g., Realty Holding*
 10 *Co. v. Donaldson*, 268 U.S. 398, 399 (1925) ("The bill alleges that . . . appellee [is] a 'resident'
 11 of Michigan. This is not a sufficient allegation of appellee's Michigan citizenship."). Plaintiff's
 12 proposed restatement to correct the erroneous "residency" allegations would therefore still fail
 13 to satisfy national and state citizenship requirements. Such an amendment would be futile.

14 **2. Plaintiffs cannot allege diverse citizenship of any Defendant in good faith.**

15 **a. Plaintiffs must contradict their evidence to plead diversity of Lin and**
 16 **Wang.**

17 Plaintiffs do not propose to address their failure to allege the domicile of the individual
 18 parties. A person's domicile is a permanent home, where he or she resides with the intention to
 19 remain or to which he or she intends to return. *See Lew v. Moss*, 797 F.2d 747, 749 (9th Cir.
 20 1986). A person residing in a state is not necessarily domiciled there, and thus is not necessarily
 21 a citizen of that state. *See Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957)
 22 ("Residence is physical, whereas domicile is generally a compound of physical presence plus an
 23 intention to make a certain definite place one's permanent abode, though, to be sure, domicile
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1 often hangs on the slender thread of intent alone, Residence is not an immutable condition
 2 of domicile."'). Plaintiffs identify no allegation, present no facts, and make no argument
 3 showing that they can establish the respective domiciles of Defendants Lin and Wang. In
 4 failing to acknowledge that defect, Plaintiffs would again fail to identify a basis for diversity.
 5

6 Indeed, Plaintiffs actually *contradict* their claim to diversity by presenting evidence and
 7 argument tending to show that Lin and Wang are *California* domiciliaries. Plaintiffs contend
 8 Lin and Wang (1) were "transferred" and relocated to California as recently as August 2005; (2)
 9 were employed at Plaintiffs' offices in Fremont, California until resigning on March 31, 2006;
 10 (3) have one or more relatives in California and lived with family in Cupertino, California at
 11 least since their move to California; (4) later founded Image Device, Inc. using a San Jose,
 12 California headquarters and telephone numbers; and (5) utilized that California address and
 13 telephone numbers continuously, only deleting them from Image Device's website after a April
 14 6, 2007 cease and desist letter. *See* Opp'n Mem. at 7; Liang Decl. ¶¶ 4, 5, 8, 11, 12, and Exhs.
 15 A, B, C, D, F, G, I. Plaintiffs however, fail to identify or argue either Lin or Wang's domicile
 16 when the Complaint was filed.⁴
 17
 18

19 **b. Plaintiffs will contradict their evidence of Image Device's citizenship.**
 20

21 In addition, Plaintiffs have failed to plead and establish citizenship for themselves and
 22 for Defendant Image Device. Any corporation, "shall be deemed to be a citizen of any State by
 23

24 ⁴ Although not argued by Plaintiffs, Declarant Liang claims that at some time before or during
 25 March 2006, Lin and/or Wang "assured me that they intended to go back to Georgia and start a
 26 Chinese restaurant business there without any further involvement in hi-tech business [sic]." Liang Decl. at ¶ 9. At best, the statement is only relevant to the speaker's state of mind at one
 27 moment in March or April 2006 – not to the speaker's domicile at the time of the June 2007
 28 Complaint. This is inadmissible hearsay and disputed by Defendants. If such statement was
 made, the speaker's seriousness and commitment to carry it out has not been established – they,

1 which it has been incorporated and of the State where it has its principal place of business.” 28
 2 U.S.C. § 1332(c)(1). Here, the Complaint states that Atech and Suntek are each “organized
 3 under the laws of the state of California,” but does not state that either is incorporated there.
 4
 5 Comp. ¶ 1. They also allege that Image Device is a “Georgia corporation,” but fail to allege
 6 incorporation. Comp. ¶ 4. Plaintiffs therefore have failed to plead corporate citizenship.

7 Moreover, even though Defendants have not contested the alleged citizenship of Image
 8 Device, Plaintiffs appear to do so. They present evidence contradicting their Complaint, which
 9 identified Image Device’s principal place of business in Georgia, by arguing and offering
 10 evidence tending to show that Defendant Image Device has maintained a “continuous and
 11 systematic” state presence and operations through its headquarters in California. *See* Comp. ¶
 12 4; Opp’n Mem. at 7, 9-10 (arguing under Fed. R. Civ. P. 12(b)(2)); Liang Decl. ¶¶ 11, 12 and
 13 Exhs. G, H, I.
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15
 16 Plaintiff’s evidence and argument is typically offered to establish a corporation’s
 17 principal place of business under the Ninth Circuit’s “place of operations” test. *See Tosco*
 18 *Corp. v. Communities for a Better Environment*, 236 F.3d 495 (9th Cir 2001) (granting motion
 19 to dismiss for lack of diversity without prejudice to refile in state court where “place of
 20 operations” test showed corporation to have principal place of business in California).
 21

22 **c. Necessary amendments will likely contradict Plaintiffs’ proffered facts.**

23 The Supreme Court agreed that “the scope of 1653 . . . allows appellate courts to remedy
 24 inadequate jurisdictional *allegations*, but not defective jurisdictional *facts*.” *Newman-Green,*
 25 *Inc. v. Alfonzo-Larrain*, 490 U.S. at 832 (citation omitted). Here, Plaintiffs were given an
 26

27
 28 in fact, *did* found a technology product company, Image Device, and did *not* open a Chinese restaurant.

1 opportunity to offer a factual basis for diversity jurisdiction in their Complaint and in response
 2 to Defendants' motion to dismiss, but did not do so. "[T]here was not merely a defective
 3 allegation of jurisdiction, but rather there was no tendered showing that jurisdiction in fact
 4 existed" *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986).

5
 6 As discussed *supra*, Plaintiffs have not only failed to tender a basis, they have presented
 7 evidence tending to *undermine* it as to each Defendant. Where a Plaintiff presents such
 8 argument and evidence and the likely result of amendment would again produce defective
 9 jurisdictional allegations, leave should not be granted. *See, e.g., Nablo v. Desert Plastics, LLC*,
 10 2006 WL 288394 at *4 (D.Ariz. Feb 06, 2006) (denying amendment under 28 U.S.C. § 1653 as
 11 a "futile gesture prejudicial to defendants" upon accepting plaintiff's arguments and evidence
 12 attached to plaintiff's opposition to motion to dismiss amended complaint, finding that they
 13 "tend to corroborate, rather than upset" physical presence of both defendants in plaintiff's state
 14 of citizenship).

15
 16 Plaintiffs have revealed an inadequate investigation and foreshadowed contradictory
 17 jurisdictional allegations and facts. As a result, Plaintiffs fail to provide a basis to believe an
 18 amendment of the Complaint satisfying their burden could be achieved in good faith.
 19 Accordingly, subject matter jurisdiction would not be established by a good faith amendment
 20 and Plaintiffs' Complaint should be dismissed in its entirety without leave to amend.

21 **II. PERSONAL JURISDICTION OVER DEFENDANT IMAGE DEVICE.**

22
 23 Defendants argued that no personal jurisdiction over Defendant Image Device has been
 24 established. Def's Mem. at 6-10. As discussed above, Plaintiffs argue and attempt to prove that
 25 Defendant Image Device has maintained a continuous and systematic physical presence and
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1 operations in California. Opp'n Mem. at 9. If correct, Plaintiffs severely undermine their claim
 2 to complete diversity jurisdiction. *See supra*.

3 **III. PLAINTIFFS FAIL TO STATE ANY CLAIM.**

4
 5 Plaintiffs ignore *Twombly* and invoke the more liberal pleading requirements of *Conley*.
 6 Opp'n Mem. at 14-15. *See* Defs' Mem. at 11 (discussing *Bell Atlantic Corp. v. Twombly*, 127
 7 S.Ct.1955, 1960 (2007)). But in *Twombly*, the Court said *Conley*'s "no set of facts" standard
 8 has "earned its retirement." *Id.* at 1969. Under *Twombly*, the facts stated in the Complaint must
 9 make Plaintiffs' claims *plausible* - not merely *possible* as previously allowed under *Conley*. As
 10 with UTSA-preempted Counts II, IV and V, dismissal can be based on lack of a cognizable
 11 legal theory or, as in Counts I and III, the absence of sufficient facts alleged under a cognizable
 12 legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

13
 14 Plaintiffs seek leave to amend under Rule 15(a). Opp'n at 14. A court granting a
 15 motion to dismiss need not allow amendment where no set of consistent facts can be proved
 16 under an amendment which would constitute a valid claim. *See Saul v. United States*, 928 F.2d
 17 829, 843 (9th Cir. 1991). A court is within its discretion to deny leave to amend when finding
 18 an "apparent or declared reason – such as undue delay, bad faith[,] dilatory motive on the part
 19 of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the
 20 amendment, [or] futility of the amendment. . . ." *Foman v. Davis*, 371 U.S. 178, 182, (1962).
 21 *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-47 (9th
 22 Cir.1990) (no leave where amendment would be futile).

23
 24 To assess "futility," a court examines whether the complaint could be amended to cure
 25 the defect "without contradicting any of the allegations of [the] original complaint." *Reddy v.*
 26 *Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir.1990). An amended complaint cannot allege facts
 27
 28

inconsistent with the challenged pleading. *Id.* at 296-97. *See also, Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (“If a complaint is dismissed for failure to state a claim, leave to amend should be granted *unless* the court determines that the allegation of other facts *consistent with the challenged pleading* could not possibly cure the deficiency.”) (emphasis added). Plaintiffs cannot so cure Counts I through V by amendment.

A. Count I for misappropriation of trade secrets under C.C.C. § 3426.

1. Defendants still do not have adequate notice of the disputed customers.

Plaintiffs claim in Count I that Defendants contacted unidentified customers on a customer list, in violation of the UTSA. Comp. ¶¶ 13, 16. These allegations impose a severe and unfair hardship on Defendants due to the vagueness of the allegations. Contrary to Rule 8 and *Twombly*, Defendants have not been notified through the Complaint (or opposition papers) of any disputed customer’s identity other than Rpssoft – and cannot admit or deny (let alone defend) the allegations as to any others that may be part of the Plaintiffs’ “customer list.” Moreover, Defendants cannot know to which of their own existing or potential customers they may sell due to the vague pleading. They must suffer either foregoing customer opportunities or risking unspecified damages due to Plaintiffs’ non-specific allegations.

2. Plaintiffs cannot amend Count I to plead trade secret protection over the customers in good faith.

Despite Plaintiffs’ arguments otherwise, a reasonable reading of the Complaint reveals that the only “trade secret” at issue is the identity of buyer contacts alleged to constitute a “customer list.” Comp. ¶ 10 (only information alleged on customer lists is “ready and accessible” buyer contacts). Indeed, Plaintiffs identify “customer lists” as separate and distinct proprietary and trade secret information from “vendor lists, pricing data, sources of supply, and financial data of Plaintiffs.” Comp. ¶ 8. Plaintiffs then direct allegations in the Complaint only

1 to “customer lists.” *See* Comp. ¶¶ 10, 13, 15 (stating only that “Defendants misappropriated
 2 Plaintiffs’ *customer lists* . . .”), 16. Tellingly, they seek relief only preventing Defendants from
 3 “continuing the misappropriation of Plaintiffs’ trade secret by ongoing use of Plaintiffs’
 4 *customer lists*; . . .” Comp. at 6 (prayer for relief). Accordingly, Plaintiffs’ customer identities
 5 must be trade secrets to maintain Count I.
 6

7 Plaintiffs do not dispute Defendants’ argument that Suntek and Atech reveal customer
 8 identities via their respective websites. Def’s Mem. at 13-14. This practice dissolves any
 9 secrecy in their customer relationships through public disclosure. They also decline to dispute
 10 that through a few clicks of a mouse and an internet connection, these customers and sales
 11 contacts can be identified online by anyone with little to no effort. *Id.*
 12

13 Plaintiffs further concede that Atech’s logo on its products allows any person to know of
 14 Atech’s relationship with its individual customers, including photo kiosk customers such as
 15 Rpsoft. Opp’n Mem. at 12. Atech does not maintain secrecy around the existence of such
 16 customer relationships with Rpsoft or unnamed others. There can be no trade secret protection
 17 surrounding the identity of such customers. *See Morlife, Inc. v. Perry*, 56 Cal. App. 4th at
 18 1521-22 (“courts are reluctant to protect customer lists to the extent they embody information
 19 which is ‘readily ascertainable’ through public sources . . .”).
 20

21 Plaintiffs’ have conceded that their customer identities are not protected trade secrets.
 22 Plaintiffs cannot now amend to contradict their concessions. Leave to amend should be denied
 23 and Count I dismissed with prejudice.
 24

25 **B. Count II for common law misappropriation of trade secrets should be dismissed**
 26 **with prejudice.**

27 Plaintiffs conflate common law misappropriation tort remedies and contractual remedies
 28 to argue that Count II “is based on both breach of employment agreement and misappropriation

1 of trade secrets” and that “since the contractual remedy is also included in the plaintiff’s [sic]
 2 second count, this common law misappropriation of trade secret is not preempted by UTSA . . .
 3 .” Opp’n Memo. at 12.

4
 5 Nevertheless, the UTSA’s plain language specifically and separately identifies statutory
 6 claims, contract remedies and civil tort remedies. *See* Cal. Civ.Code § 3426.7(a)-(b) (separately
 7 and distinctly excluding from preemption “any *statute* relating to misappropriation of a trade
 8 secret, or any *statute* otherwise regulating trade secrets” and “*contractual remedies*, whether or
 9 not based upon misappropriation of a trade secret,” and “*other civil remedies* that are not based
 10 upon misappropriation of a trade secret”). Count II must be dismissed with prejudice because it
 11 simply cannot proceed in light of UTSA’s preemptive effect.
 12

13 Moreover, this Court recognizes that “misappropriation of trade secrets is an intentional
 14 tort.” *O2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc.*, 420 F.Supp.2d 1070 (N.D.Cal.
 15 2006), *aff’d* 221 Fed. Appx. 996 (Fed. Cir. 2007) (Wilken, j.) (citing *PMC, Inc. v. Kadisha*, 78
 16 Cal.App.4th 1368, 1382 (2000)). In addition, Plaintiffs do not dispute Defendants’ argument
 17 that Count II fails to identify – let alone plead - a cognizable legal theory, claim elements, or
 18 cause of action under California law. Defendants must guess to defend Count II. Moreover,
 19 because UTSA preempts Count II, it cannot be cured and should be dismissed with prejudice.
 20
 21

22 **C. Count III for breach of a non-existent employment agreement should be**
 23 **dismissed with prejudice.**

24 Plaintiffs do not dispute Defendants’ argument that they have failed to plead Plaintiffs’
 25 fulfillment of obligations under a supposed “employment agreement.” Instead, they argue that
 26 they need not plead the elements of a contract claim. Opp’n Mem. at 13 (“Nothing in Rule 8(a)
 27 requires plaintiffs to plead every single element of a cause of action . . .”). However, pleading
 28 the elements is necessary (but not sufficient) to survive an attack on legal sufficiency.

1 *Twombly, supra* (“[A] plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to
 2 relief” requires more than labels and conclusions, and *a formulaic recitation of the elements of*
 3 *a cause of action will not do.*”) (emphasis added) (citation omitted).

4
 5 Plaintiffs further argue that their vague allegations in Count III satisfy Rule 8(a) by
 6 “appris[ing] defendants of the existence of the employment agreement,” their duties “not to use
 7 or disclose certain plaintiffs’ proprietary information and trade secret in direct competition
 8 against plaintiffs,” and their breach of the agreement. Opp’n Mem. at 13 (emphasis added).
 9 But neither the Complaint nor Plaintiffs’ opposition identifies the existence of a valid,
 10 enforceable contract. Indeed, the Complaint identifies only a single, vague “employment
 11 agreement” among *all* of the parties - despite naming *two* purported employers, *two* individual
 12 employees and an approximate *eight-year* period. Plaintiffs also fail to identify, explain or offer
 13 to amend with any of the critical facts to allow Defendants to defend themselves: the parties to
 14 “the agreement” or series of agreements, relevant dates and duration, the obligations of each
 15 party, and the form of the agreement, to name only a few.

16
 17
 18 Based on the declaration of Larry Liang, Plaintiffs amend of Count III would be futile
 19 because no agreement existed. His testimony reveals the totality of the claimed “agreement” --
 20 he once “told” and twice “reminded” Defendants Lin and Wang not to misappropriate
 21 proprietary information on three occasions: prior to beginning employment in 1998, once
 22 during their respective employment terms, and finally at or after their respective resignations
 23 from one or both Plaintiffs’ employ in March 2006. Liang Decl. ¶¶ 3, 4, 9. Liang’s testimony
 24 establishes facts that, if pled through amendment, would fail to show an enforceable agreement.
 25 Plaintiffs are now limited to plead consistently with those facts and those in the Complaint in
 26
 27
 28

any amendment. As a result, Count III does not state a claim and cannot be amended in good faith to do so. Count III should be dismissed with prejudice.

D. Count IV for intentional interference with economic relationship should be dismissed with prejudice.

Plaintiffs do not contest Defendants' argument that they have failed to plead facts stating a claim for intentional interference. On this ground alone, Count IV should be dismissed.

In opposing dismissal of Count IV as preempted by the UTSA, Plaintiffs avoid addressing the *Ernest Paper* and *Convolve* cases discussed by Defendants. Defs' Mem. at 18-19. Instead, they again argue – as with Count II – that Count IV for “intentional interference of economic relationship” is a hybrid tort-contract cause of action. Opp'n Memo at 13. There can be little doubt that Count IV asserts an independent, intentional tort theory and remedies rather seeking a contract remedy. As with Count II, Count IV is preempted by the UTSA and should be dismissed with prejudice.

In a surprisingly argument, Plaintiffs say that the only identified customer, Rpsft, is now known to Defendants because the Complaint's short, plain statement “has placed defendants on notice of plaintiffs' existing business relationship with Rpsft and their damages sustained.” Opp'n Memo at 13. This statement supports Defendants' position that they had no notice that Plaintiff's now claim trade secret protection over any customers. Indeed, to be a trade secret, information must be understood to be protected prior to the alleged wrongful conduct – not retroactively deemed so to generate litigation. Defendants' admitted lack of prior knowledge of the protected nature of the customer relationship negates the necessary intent to commit the tort.

E. Count V for alleged conspiracy should be dismissed with prejudice.

Plaintiffs do not address *Abanco*, preferring to argue – as with Counts II and IV – that their claim in Count V for “conspiracy” is not preempted by the UTSA because it is a hybrid

1 tort-contract cause of action. Opp'n Memo at 13-14. *Applied Equipment*, cited by Plaintiffs
 2 and Defendants, establishes that "Civil conspiracy is not a cause of action" in California law,
 3 but is "a legal doctrine that imposes liability on persons who, although not actually committing
 4 a *tort* themselves, share with the immediate *tortfeasors* a common plan or design in its
 5 perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-511 (1994)
 6 (emphasis added). Under *Abanco*, conspiracy to misappropriate trade secrets is a preempted
 7 tort. Defs' Mem. at 20-21. Plaintiffs do not cite authority to the contrary. As with Counts II
 8 and IV, Plaintiffs conspiracy claim is preempted by the UTSA and should be dismissed with
 9 prejudice.
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11 CONCLUSION

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 13 For the foregoing reasons, Defendants request that this Court dismiss the Complaint
 14 pursuant to Federal Rule of Civil Procedure 12(b)(1) and that Plaintiffs' request for leave
 15 amend jurisdictional pleadings be denied. In the alternative, the Complaint should be dismissed
 16 in its entirety with prejudice as to Counts I through V pursuant to Rule 12(b)(6) and *Twombly*.
 17 Finally, Defendant Image Device should be dismissed pursuant to Rule 12(b)(2). Leave to
 18 amend pursuant to Rule 15 should be denied.
 19
 20

21 Respectfully submitted,

22
 23 Dated: August 21, 2007

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CERTIFICATE OF SERVICE

The foregoing document has been filed electronically with the Clerk of the Court this day through the Court's electronic filing system, which will provide notice to the following E-mail recipients:

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